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No. 04-429

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

B. BOYKIN ROSE, ET. AL.,

Petitioners,

—v.—

PLANNED PARENTHOOD HEALTH SYSTEMS, INC., D/B/A PLANNED PARENTHOOD OF SOUTH CAROLINA; AND RENEE CARTER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly hold that Plaintiffs have standing to raise a viewpoint discrimination claim under the First and Fourteenth Amendments to the United States Constitution, where they challenge the discriminatory treatment they suffered when South Carolina authorized a special "Choose Life" automobile license plate and refused to authorize a similar "pro-choice" license plate?

2. Did the Fourth Circuit correctly hold that, when South Carolina authorized a special license plate with the message "Choose Life," which could be purchased for an extra fee by motor vehicle owners wishing to express that view, and South Carolina refused to authorize another special license plate with a "pro-choice" message, South Carolina violated the First Amendment rights of those who seek to communicate the latter message on their license plates?

LIST OF PARTIES

Petitioners: (1) B. BOYKIN ROSE, in his official capacity as the Director of the Department of Public Safety of the State of South Carolina;

(2) JON E. OZMIT, in his official capacity as the Director of the Department of Corrections of the State of South Carolina;

(3) KIM S. AYDLETTE, in her official capacity as the Director of the Department of Social Services of the State of South Carolina.

Respondents: Both respondents are listed in the case caption.

Planned Parenthood Health Systems, Inc., d/b/a Planned Parenthood of South Carolina, is the only Respondent that is a corporation. It does not have a parent corporation, nor is it owned in any part by a publicly held company.

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STATEMENT OF THE CASE

In 2001, South Carolina enacted legislation (the "Act") authorizing the issuance of a special motor vehicle license plate bearing the message, "Choose Life." The Act directed the Department of Public Safety to produce the plate after it received 400 prepaid applications or a deposit of $4000 from an interested individual or organization. S.C. Code Ann. § 56-3-8910(C). The Act provided that the fee for the special plate is seventy dollars every two years in addition to the regular registration fee. *Id.* at § 56-3-8910(A). The Act directed that revenue from the sale of the "Choose Life" plate be used to award grants to nonprofit organizations that provide "crisis pregnancy services,"[1] but not to any organization that "provides" or "refers for" abortions. *Id.* at § 56-3-8910(B).

During the legislative process leading to passage of the Act, a representative of one of the Plaintiffs sought authorization for a comparable plate with a "pro-choice" message in a subcommittee hearing in the South Carolina House of Representatives. Her request was not acted upon, and the bill then before the subcommittee never reached a floor vote. Then, at the end of the same legislative session, a bill authorizing a different special license plate was amended to include the Act. That amended legislation passed both houses of the legislature, and became law.[2]

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[1] The Act does not define this term.

[2] South Carolina has a different, administrative process, by which nonprofit organizations may obtain approval to have a license plate that displays the organization's "emblem, seal, or other symbol." However, these plates may only be sold to certified members of the organization. They may not be sold to any automobile owner who desires to display the message carried on the plate. S.C. Code Ann. § 56-3-8000.

Plaintiffs are an individual owner (Carter) of an automobile registered in South Carolina and a non-profit organization (Planned Parenthood Health Systems, Inc., d/b/a Planned Parenthood of South Carolina ("Planned Parenthood")) that provides reproductive health services, including abortions and abortion referrals, in South Carolina. Planned Parenthood also engages in public advocacy to protect access to all reproductive health services, including abortion.

Plaintiffs filed this civil action in the United States District Court for the District of South Carolina shortly after the Act went into effect. Plaintiffs sought a judgment declaring that—by authorizing a special license plate with the "Choose Life" message for purchase by automobile owners seeking to express that message, and declining to authorize a special license plate with a "pro-choice" message—South Carolina had violated rights secured to Plaintiffs under the First and Fourteenth Amendments.[3] Plaintiffs also sought appropriate injunctive relief.

The district court granted Plaintiffs' motion for a preliminary injunction, and subsequently granted summary judgment to Plaintiffs, finding that the Act violated the First Amendment, and that Plaintiffs have standing to challenge the Act on that ground. Pet. App. 70a, 81a, 86a, 90a.

On appeal, a unanimous panel of the Fourth Circuit affirmed the district court's judgment. On the standing

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[3] Plaintiffs also sought a declaratory judgment that the provision of the Act that disqualified Planned Parenthood from eligibility for funds generated by the sale of the plates, solely because Planned Parenthood provides and refers for abortions, violated Planned Parenthood's and its patients' rights under the First and Fourteenth Amendments. However, as the case was disposed of on the challenge to the authorization of the plates, this claim was never reached.

question, in the opinion that included the judgment of the Court, Judge Michael concluded that Plaintiffs had suffered actual injury—"discriminatory treatment"—due to South Carolina's opening the license plate forum to allow private citizens to express the "Choose Life" viewpoint, while excluding motor vehicle owners such as Plaintiff Carter from using the same forum to express a different viewpoint. Pet. App. 34a. Judge Michael also concluded that striking down the Act would afford Plaintiffs equal treatment in the license plate forum and thereby redress Plaintiffs' injury. Pet. App. 35a-36a.

On the merits, Judge Michael applied a four-factor test previously used by the Fourth and other circuits to determine whether the "Choose Life" message was government speech or private speech. He concluded that two factors—the central purpose of the plate, and the relative degrees of editorial control exercised by the government and the citizen—weighed in favor of the message being government speech, while the remaining two factors—the identity of the literal speaker, and who bears ultimate responsibility for the content of the speech—weighed in favor of the message being private speech.[4] Thus, Judge Michael concluded that the "Choose Life" plate was a mixture of both government speech and private speech. Pet. App. 41a-46a.

Noting that "[t]he State contends only in passing that the Act does not discriminate based on viewpoint," Judge Michael next concluded that the Act was viewpoint discriminatory. Pet. App. 46a. "In the license plate forum, South Carolina has authorized the expression of only one position in the abortion debate, thereby promoting the expression of one viewpoint (pro-life) while

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[4] The district court applied the same four-factor test and concluded that the "Choose Life" license plate is solely private speech. Pet. App. 82a. Plaintiffs believe that this is the correct conclusion.

preventing the expression of the other viewpoint (pro-choice)." Pet. App. 47a.

Finally, Judge Michael concluded that, in spite of the presence of some element of government speech mixed-in with the private speech, this viewpoint discrimination was unconstitutional. Judge Michael cited several considerations that led him to that conclusion. First, he noted that the specialty plates were more like a speech forum than the situations, such as a government-funded program, where this Court has applied the government speech doctrine to reject a viewpoint discrimination claim. Pet. App. 48a-54a. "[T]he State does not enlist vehicle owners to convey the imprinted message in the way that employees of a government-funded enterprise are enlisted to carry out the programs of that enterprise. . . . Rather, vehicle owners purchase and display the Choose Life plate because they agree with the message." Pet. App. 54a. Next, he noted that, by allowing only the "pro-life" message in the license plate forum, South Carolina was not just engaging in viewpoint discrimination, but was "favor[ing] its own position" by authorizing only a plate for those who share its view. Pet. App. 54a-55a. Finally, he observed that this allowed the State to create the impression, at least as far as messages on license plates are concerned, that one viewpoint dominates the debate, and obscured the State's role in creating this impression. Pet. App. 55a-57a.

For all of these reasons, Judge Michael concluded that upholding South Carolina's viewpoint discrimination would "require an unwarranted extension of the government speech doctrine." Pet. App. 48a.

Judges Luttig and Gregory concurred with Judge Michael in separate opinions. Pet. App. 58a-63a.

Subsequently, the panel denied South Carolina's request for rehearing, and by a vote of 8 to 5, the Fourth Circuit denied South Carolina's petition for rehearing *en banc*. Pet. App. 3a.

REASONS FOR DENYING THE PETITION

The petition for a writ of certiorari should be denied.

On the standing issue, the Fourth Circuit's conclusion is not in conflict with the standing ruling in the Fifth Circuit case, *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002), *cert. denied*, 537 U.S. 1048 (2002), or the Eleventh Circuit case, *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003). Even if there is a limited, indirect, conflict with the Fifth Circuit's decision, the standing ruling in the Fifth Circuit case did not dispose of that litigation, and that litigation continues. Any conflict, therefore, with the Fifth Circuit on the standing question is insignificant and does not warrant review.

On the substantive merits of the dispute, South Carolina's petition reduces to a simple disagreement over the Fourth Circuit's application of a legal standard, which South Carolina has not challenged, to conclude that the "Choose Life" license plate involves private speech. That issue does not present a question of federal law of sufficient importance to merit certiorari. Moreover, there is no conflict among the circuits or, indeed, even among the district courts that have considered the nature of the speech, and the permissibility of viewpoint discrimination, when a state authorizes a message to be communicated on its license plates by individual automobile owners who choose to pay an extra fee for a plate with that message.

Therefore, on the standing question, there is, at most, only an indirect conflict between the Fourth Circuit's holding and a holding of the Fifth Circuit, and the Fifth Circuit's holding did not resolve that litigation. On the substantive merits of the Fourth Circuit holding, there is neither an important question of federal law, nor any conflict with any federal court. Under these circumstances, there is no reason for this Court to grant certiorari.

I. REVIEW IS NOT WARRANTED ON THE STANDING ISSUE BECAUSE THERE IS NO CIRCUIT CONFLICT ON AN "IMPORTANT MATTER."

South Carolina contends that certiorari is warranted on the issue of Plaintiffs' standing because the Fourth Circuit's decision is in "direct conflict" on an "important matter" of federal law with the decisions of the Fifth and Eleventh Circuits in *Henderson v. Stalder*, 287 F.3d 374 (5th Cir. 2002) and *Women's Emergency Network v. Bush*, 323 F.3d 937 (11th Cir. 2003) (hereinafter "*WEN*"). South Carolina is mistaken.

First, there is no conflict between the Fourth Circuit's decision and the Eleventh Circuit's decision in *WEN* because the circumstances in *WEN* were very different. In Florida—unlike South Carolina—a specialty plate may be authorized by the legislature only after the organization seeking the plate has completed a formal application process. Fla. Stat. Ann. § 320.08053.[5] The

[5] That process requires the submission of a written request, a scientific survey indicating that at least 15,000 owners would purchase the plate, an application fee, and a marketing strategy describing marketing plans for the plate and outlining the anticipated revenues and planned expenditures of the revenues generated by the plate. *See* Fla. Stat. Ann. § 320.08053(1).

WEN plaintiffs never filed a formal application. *WEN*, 323 F.3d at 946. Thus, the Eleventh Circuit concluded that the *WEN* plaintiffs lacked standing to challenge Florida's "Choose Life" statute because they had not suffered any discriminatory treatment. Discriminatory treatment could arise in Florida only if the Florida legislature had rejected a properly filed application for a "pro-choice" license plate. *Id.* at 946-47. ("The State of Florida has not denied Appellants access to the specialty license plate forum. It has not rejected Appellants' application for a specialty license plate, and it has not applied Fla. Stat. § 320.08053 in a discriminatory manner. Until it does so, Appellants . . . lack standing to bring their claim.").[6]

By contrast, South Carolina has no formal application process. Instead, specialty license plates with messages such as "Choose Life" are authorized by legislation at the sole discretion of the legislators. As the Fourth Circuit noted, the statutory authorization for the "Choose Life" license plate "came about because of the perseverance of two legislators who were acting on their own initiative." Pet. App. 32a.[7] Having authorized one view-

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[6] Judge Shedd was, therefore, off-target in his opinion dissenting from the denial of rehearing *en banc* when he stated that the Eleventh Circuit "found standing lacking even where the plaintiffs had attempted, but failed, to obtain enactment of a statute authorizing "pro-choice" specialty plates." Pet. App. 11a n.3. A Florida Senator had offered an amendment that would have created a "pro-choice" specialty license plate, but there was no formal application for that license plate as required by Florida law. *WEN*, 323 F.3d at 941.

[7] The license plates authorized by S.C. Code Ann. § 56-3-8000 for nonprofit organizations are different. *See* note 2 *supra*. Judge Michael's opinion properly notes that Plaintiffs' failure to apply for an organizational plate is "not fatal to their standing" because "such a plate would not allow an expression that is equivalent to the Choose Life plate." Pet. App. 38a.

point on the abortion debate to speak on specialty license plates, South Carolina acted discriminatorily when, in spite of a request for a license plate with the opposing viewpoint, it excluded that other viewpoint.

Second, the Fourth Circuit's conclusion on standing does not directly depart from the Fifth Circuit's *Henderson* decision because the injury alleged there was different than the injury alleged by Plaintiffs. According to the Fifth Circuit, the plaintiff there alleged that her injury was the "den[ial of] the opportunity to express her pro-choice point of view," *Henderson*, 287 F.3d at 381. The Fifth Circuit concluded that this injury was not redressable because, even if the court declared the Louisiana law unconstitutional, that would not provide the plaintiff there with the forum she sought to express her views. *Id.*

Here, by comparison, the Fourth Circuit found that Plaintiffs' allegation of injury—the "discriminatory treatment they suffer from the State's use of the license plate forum to promote one political viewpoint (pro-life) in the debate about abortion," Pet. App. 34a[8]—was capable of redress by striking down the Act. As Judge Michael explained, "plaintiffs in discrimination cases may seek equal treatment in the form of a level playing field, regardless of whether this is achieved by extending benefits to the disfavored group or by denying benefits to the favored group." *Id.* This holding is consistent with many decisions of this Court. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 7-8 (1989); *Heckler v. Matthews*, 465 U.S. 728, 738 (1984); *Regents*

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[8] *See also* Pet. App. 36a: "[T]his case is not about people seeking to obtain license plates bearing the messages of their choice; it is about whether, by enacting the Choose Life Act, the State had impermissibly favored one viewpoint over another."

of University of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

Moreover, it is wrong for South Carolina to claim that the Fourth Circuit "failed to consider" the analysis in *Henderson*. Cert. Pet. 13. Judge Michael's opinion noted that Plaintiffs "also allege as an injury their inability to obtain a "pro-choice" license plate, but this does not entitle them to standing." Pet. App. 36a. Thus, the Fourth Circuit essentially agreed with the Fifth Circuit on whether this characterization of injury conferred standing. The Fourth Circuit simply concluded that, since Plaintiffs had also alleged discriminatory treatment, "the sounder approach is to recognize discriminatory treatment as the actual injury," Pet. App. 36a, and find standing on that basis.

Both circuits stated the proper standing test. They reached different conclusions as a result of the different injuries alleged by the different plaintiffs. To the extent that this is a conflict, it is a limited conflict that does not merit review by this Court. South Carolina certainly overstates its case when it contends that this "conflict is important because there now is a dispute among the circuits regarding the constitutional minimum requirements for standing." Cert. Pet. 9-10.

No less importantly, any such conflict is merely academic because, at the Fifth Circuit's instigation, the litigation in Louisiana has proceeded. After this Court denied the *Henderson* plaintiff's petition for writ of certiorari, the Fifth Circuit issued an order permitting the matter to proceed if the plaintiff amended her complaint to challenge Louisiana's overall policy and practice of issuing specialty license plates. *Henderson v. Stalder*, No. 00-31171, 2003 WL 151183 (5th Cir. Jan. 9, 2003). The plaintiff amended her complaint, and the district court accordingly ruled that the plaintiff had standing

and struck Lousiana's policy and practice of issuing specialty plates, including the statute that authorized the "Choose Life" plate. *Henderson v. Stalder*, 265 F. Supp. 2d 699 (E.D. La. 2003). That matter is currently on appeal. *Henderson v. Stalder*, No. 03-30699 (5th Cir. filed Jul. 23, 2003). Because that matter has proceeded despite the Fifth Circuit's initial dismissal of the case for lack of standing, any conflict between the circuits has no real significance, and this Court should decline to grant certiorari.

Finally, South Carolina is certainly mistaken about this matter's importance when it contends that it "involves the question whether a person has standing to challenge a legislative enactment without making any substantial effort to seek expression of their opposing viewpoint." Cert. Pet. 16. There is no such question in this case because Plaintiffs *did* seek to express their opposing viewpoint by appealing to the legislature for a "pro-choice" plate. At a legislative committee hearing, Planned Parenthood sought to amend a "Choose Life" bill to include authorization of a "pro-choice" plate. Pet. App. 31a.[9] Thus, this is not a case about a "single individual" who seeks to halt a license plate "merely upon an allegation that they have not been provided with the opportunity to express an opposing viewpoint." Cert. Pet. 17.

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[9] Judge Shedd was again in error when he stated in his opinion dissenting from the denial of rehearing that "no . . . effort was made in this case" to obtain enactment of a statute authorizing "pro-choice" specialty license plates. Pet. App. 11a n.3. South Carolina contends that Plaintiffs' effort was "insufficient." Cert. Pet. 16. However, imposing a requirement about "how far" a party must pursue a legislative proposal in order to clear the standing threshold in these circumstances would enmesh the courts in impossible line-drawing. It is clear that Plaintiffs sought a specialty plate and that their efforts were rebuffed.

There is no conflict between the Fourth and Eleventh Circuits on the standing question. Nor is there any conflict between the Fourth and the Fifth Circuits. To the extent that there is any disagreement between the Fourth and Fifth Circuits, it is limited and indirect, and certainly does not give rise to a conflict on an "important matter" as this Court's rules require.

II. THE FOURTH CIRCUIT'S DECISION ON THE SUBSTANTIVE ISSUE IN THE LITIGATION IS NOT AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT; NOR IS THERE ANY CONFLICT AMONG THE CIRCUITS.

South Carolina mischaracterizes the holding of the Fourth Circuit. The Fourth Circuit did not hold that, when government is speaking, it must "affirmatively provide for the expression of opposing viewpoints." Cert. Pet. 11. It found that, in this particular license plate situation, the plate was both private speech and government speech. Pet. App. 45a. It also found that the nature of the medium was more like a "forum" than like a "government program." Pet. App. 48a-54a. For these reasons—the significant element of private speech, and the "forum" nature of the medium—the Fourth Circuit concluded that South Carolina could not discriminate on the basis of viewpoint in terms of authorizing one message while refusing to authorize another.

South Carolina does not dispute that the refusal to authorize a "pro-choice" license plate is viewpoint discriminatory. Nor does South Carolina dispute the Fourth Circuit's conclusion that, where the speech includes a significant component of private speech, government may not engage in viewpoint discrimination. Rather, South Carolina challenges the Fourth Circuit's conclu-

sion that the speech is not simply government speech, but involves a significant component of private speech. Cert. Pet. 23.

This is not an important federal question meriting certiorari.

Indeed, South Carolina's argument is essentially that a properly stated rule of law was misapplied. South Carolina does not challenge the application of the four-factor test used by the Fourth Circuit. Instead, South Carolina disagrees with the Fourth Circuit's conclusion that the third factor (identity of the literal speaker) and fourth factor (identity of who is ultimately responsible for the message on the plate) of that test "weigh in favor of finding private speech." Pet. App. 45a. This is not a basis for certiorari. S.Ct. Rule 10.

South Carolina attempts to rest its argument on *Rust v. Sullivan*, 500 U.S. 173 (1991). Cert. Pet. 21-22. However, as Judge Michael's opinion explains, *Rust* involved a program created and funded by the government to accomplish a particular purpose, where the government enlisted private citizens to carry out the program. Under those circumstances, where the government creates a program through which it speaks, the government may prescribe the message and impose viewpoint and content limitations on it. Pet. App. 50a.

As Judge Michael found, those are not the circumstances here. Pet. App. 54a. Here, there is no program established with government funds.[10] More importantly, when citizens display the "Choose Life" plates, they will not be speaking as and for the government program, they

[10] The only funds will be those of the citizens who choose to display the message on the Choose Life plate, and even if the "crisis pregnancy services" are a program, there will be no program unless a minimum number of citizens choose to purchase the plates.

will be speaking for themselves. "When a special license plate is purchased, it is really the private citizen who engages the government to publish his message, not the government who engages the private individual to publish its message . . . ." *Sons of Confederate Veterans v. Comm'r of the Va. Dep't of Motor Vehicles*, 305 F.3d 241, 246 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing *en banc*).

Thus, South Carolina's claim that the panel's judgment threatens the government's ability to express its viewpoint in "countless other programs" is hyperbole that rests on a mischaracterization of what the Fourth Circuit found.[11] The Fourth Circuit did not, as South Carolina argues, depart from the settled law that government may favor one viewpoint when it speaks. Rather, the Fourth Circuit concluded that the speech was not government speech, but was both government speech and private speech. Then, by looking at the nature of the license plate medium, the Fourth Circuit concluded that when this mixed speech occurred in a forum opened by South Carolina rather than in a "program" created and funded by South Carolina, South Carolina could not dis-

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[11] South Carolina's claim that the Fourth Circuit judgment "implicitly undermines the ability," Cert. Pet. 10, of several other states to issue a "Choose Life" plate is likewise overstated. Many of the states South Carolina lists have not enacted such legislation, and it is impossible to predict whether they ever will. *See* Choose Life, Inc. Resources Newsletter: States Where Choose Life Plates Have Been Approved, *at http://www.choose-life.org/newsletter.html* (last visited Dec. 20, 2004). Moreover, it is equally impossible to predict, even if legislation were to be enacted in those states, whether any of the legislatures would refuse to issue a "pro-choice" plate. Many of the remaining states on South Carolina's list authorized "Choose Life" plates following a formal administrative process which, presumably, is open to (and, in some states, has successfully been pursued by) parties interested in obtaining authorization for a "pro-choice" plate.

criminate on the basis of viewpoint in allowing access to the forum.

There is nothing in the Fourth Circuit's conclusion that the "Choose Life" plates involve private speech that would undermine holdings that flying the flag in a national cemetery, *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309 (Fed. Cir. 2002), and an anti-tobacco advertising campaign that identifies itself as sponsored by the state, *R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp.2d 1085 (Cal. Ct. App. 2003), are government speech.[12] Neither involved the significant role of private speech found here, and neither involved the opening of a forum. Therefore, there is no reason for concern that the Fourth Circuit's holding has any bearing on the right of government to control its message when it speaks.

Furthermore, there is no conflict in the federal courts with the Fourth Circuit's ruling that South Carolina engaged in impermissible viewpoint discrimination by authorizing only the "Choose Life" plate. In issuing the decision below, the Fourth Circuit is the first and only federal appellate court to rule on the constitutionality of a statute authorizing a "Choose Life" license plate. Not only are there no other federal appellate court decisions on this issue—conflicting or otherwise—but the few federal district courts that have ruled on the constitutionality of "Choose Life" license plate statutes have also invalidated them as viewpoint discriminatory. *ACLU v. Bredesen*, No. 03-1046, slip. op. at 4-5 (M.D. Tenn. Sept. 24, 2004); *Henderson v. Stalder*, 112 F. Supp. 2d 589, 599 (E.D. La. 2000), *rev'd on other grounds*, 287 F.3d 374 (2002), *on remand*, 265 F. Supp. 2d 699 (E.D. La. 2003).

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[12] South Carolina's analogy to *Griffin* would be more apt had the issue there been whether the government could limit display of the Confederate flag on individual graves—but, as the *Griffin* court noted, such display was in fact permitted.

Similarly, every federal court that has considered whether individually chosen license plates containing messages or emblems are private or government speech has determined that such plates are private speech, or a mixture of private and government speech. No federal court has adopted the argument, made by South Carolina, that such plates are exclusively government speech. *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002) (finding *SCV*'s specialty license plates constitute private speech); *Perry v. McDonald*, 280 F.3d 159, 166 (2d Cir. 2001) (analyzing restriction on vanity plates as a "government regulation[ ] . . . concerning *private individuals' speech* on government-owned property") (emphasis added); *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) (analyzing a restriction on vanity plates as a restriction on private individuals' speech); *Sons of Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1101-02 (D. Md. 1997) (finding that specialty plates constitute private speech); *The Women's Res. Network v. Gourley*, 305 F. Supp. 2d 1145, 1156 (E.D. Cal. 2004) (specialty plates constitute both private and government speech).[13]

The panel's judgment is also fully in accord with this Court's decision in *Wooley v. Maynard*, 430 U.S.

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[13] The best South Carolina can muster to suggest disagreement among the lower courts on this issue is reference to an intermediate appellate court decision from Oregon that held that custom configuration of the required letters and numbers on a license plate was government speech. Cert. Pet. 24, *citing Higgins v. Driver and Motor Vehicle Servs. Branch*, 13 P.3d 531, 547-48 (Or. Ct. App. 2000). However, the Oregon Supreme Court disagreed with that conclusion, and held that the configuration of the letters and numbers was neither government speech, nor private speech, but rather "the compelled public disclosure of the registration status of the vehicle." *Higgins v. Driver and Motor Vehicle Servs. Branch*, 72 P.3d 628, 632 (Or. 2003).

705 (1977), where this Court recognized that even messages on standard license plates are associated at least partly with the vehicle owner. Indeed, as Judge Michael observed, the role of the private individual here is considerably greater than in *Wooley*: "Although a specialty license plate, like a standard plate, is state-owned and bears a state-authorized message, the specialty plate gives private individuals the option to identify with, purchase, and display one of the authorized messages. Indeed, no one who sees a specialty plate imprinted with the phrase 'Choose Life' would doubt that the owner of that vehicle holds a pro-life viewpoint." Pet. App. 44a. Moreover, without the actions of the private individuals who meet the pre-production requirement of 400 prepaid applications or $4,000, and who pay for and display these plates on their private vehicles, the plates would not even exist. *See Sons of Confederate Veterans, Inc.*, 305 F.3d at 246 (Luttig, J., respecting denial of rehearing *en banc*).

The ruling of the Fourth Circuit that South Carolina cannot engage in viewpoint discrimination in approving specialty license plates is not an important federal question, and there is no conflict in the federal courts with the Fourth Circuit's conclusion.

CONCLUSION

For all of the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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